

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RACHEL WASHINGTON, executor of the
estate of Isaiah Washington,

CASE NO. C24-0059-KKE

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THE BOEING COMPANY,

Defendant(s).

The Court previously granted a motion to dismiss the complaint filed by Defendant The Boeing Company (“Boeing”), with leave to amend. *See* Dkt. No. 27. Plaintiff Rachel Washington timely filed an amended complaint, and Boeing filed a renewed motion to dismiss it for failure to state a claim. Dkt. Nos. 28, 33. Because the Court finds that Plaintiff’s amended complaint does not cure deficiencies identified in the Court’s previous order, and its deficiencies cannot be cured via further amendment, the Court grants Boeing’s motion to dismiss without leave to amend.

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I. BACKGROUND¹

At the time of his death on November 21, 2022, Isaiah Washington (“Washington”) was an employee of Boeing, working on the assembly line in the Renton plant. Dkt. No. 28 ¶¶ 1.1, 3.1. As of September 21, 2022, Washington (a Black male) had been involved in a sexual relationship with his supervisor, Rachel Pettit (a White female), for a few months. *Id.* ¶¶ 3.2, 3.4, 3.6. At the same time, Pettit was involved in a sexual relationship with one of Washington’s co-workers on the assembly line, Ralph O’Connor (a White male), and had been for four years. *Id.* ¶¶ 3.3, 3.5.

O'Connor learned of Washington's relationship with Pettit in September 2022, when he "discovered Mr. Washington's car at Pettit's home [and] became angry, banging on Pettit's door and causing a scene. In his anger, he made threats of harm to both Pettit and Washington." Dkt. No. 28 ¶ 3.7. O'Connor had previously been disciplined at work for threatening behavior toward other employees, and "had been trying to get help for mental health issues from Boeing, but Boeing did not comply with O'Connor's requests." *Id.* ¶¶ 3.13, 3.24. Although Boeing supervisors were aware of a dispute between O'Connor and Washington based on their relationships with Pettit, Boeing "failed to step in or take any action to deescalate the situation." *Id.* ¶ 3.25.

In the days and weeks before November 21, 2022, several Boeing employees (including Boeing managers and supervisors) knew that “O’Connor had made comments that raised concerns for [the] safety of Pettit and Mr. Washington, including threats of harm, based upon O’Connor’s previous behavior, including his propensity for violence[.]” Dkt. No. 28 ¶ 3.21. Boeing offered to allow Pettit to change her shifts to avoid O’Connor, but did not extend the same offer to Washington. *Id.* ¶ 3.31.

¹ Although the Court summarized the facts alleged in the original complaint in the prior order granting Boeing's motion to dismiss, the Court provides an updated factual summary here, citing the allegations in the amended complaint. Dkt. No. 28.

1 On November 21, 2022, O'Connor waited for Washington to park his car in a public
 2 parking lot before walking to the Boeing plant. Dkt. No. 28 ¶ 3.27. O'Connor shot and killed
 3 Washington on a public street while he walked to work, and then O'Connor killed himself. *Id.*

4 Plaintiff, the executor and personal representative of Washington's estate, filed this lawsuit
 5 in King County Superior Court in December 2023, and Boeing removed the case to this Court in
 6 January 2024. *See* Dkt. No. 1. Boeing filed a motion to dismiss for failure to state a claim, which
 7 the Court granted with leave to amend. Dkt. Nos. 13, 27. Plaintiff filed an amended complaint
 8 alleging causes of action for negligence (negligent retention) and race discrimination. Dkt. No. 28
 9 ¶¶ 4.1–4.9. Boeing filed a motion to dismiss the amended complaint for failure to state a claim
 10 (Dkt. No. 33), and that motion is now ripe for resolution.²

11 II. ANALYSIS

12 A. Legal Standards

13 In evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court
 14 examines the complaint to determine whether, if the facts alleged are true, the plaintiff has stated
 15 "a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting
 16 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible if the plaintiff pleads
 17 "factual content that allows the court to draw the reasonable inference that the defendant is liable
 18 for the misconduct alleged." *Id.* "Threadbare recitals of the elements of a cause of action,
 19 supported by mere conclusory statements, do not suffice." *Id.*

20 "If a motion to dismiss is granted, a court should normally grant leave to amend unless it
 21 determines that the pleading could not possibly be cured by allegations of other facts." *Chinatown*
 22 *Neighborhood Ass'n v. Harris*, 33 F. Supp. 3d 1085, 1093 (N.D. Cal. 2014).

24 ² This order refers to the parties' briefing using the CM/ECF page numbers.

1 **B. The Amended Complaint Does Not State a Claim for Negligent Retention.**

2 The amended complaint alleges a cause of action for negligence, asserting that “Boeing’s
 3 continued retention of O’Connor was the direct and proximate cause of Mr. Washington’s injury,
 4 specifically, O’Connor’s continued employment at Boeing provided O’Connor with the
 5 knowledge necessary to stalk, confront, and subsequently gun down Mr. Washington.” Dkt. No.
 6 28 ¶ 4.3.

7 A negligent retention claim has two elements: “An employer may be liable for harm caused
 8 by an incompetent or unfit employee if (1) the employer knew, or in the exercise of ordinary care,
 9 should have known of the employee’s unfitness before the occurrence; and (2) retaining the
 10 employee was a proximate cause of the plaintiff’s injuries.” *Lynn v. Lab. Ready, Inc.*, 151 P.3d
 11 201, 207 (Wash. Ct. App. 2006). Boeing argues that the complaint does not allege facts that
 12 support either element, and that the negligent retention claim must therefore be dismissed. Dkt.
 13 No. 33 at 13–20.

14 Even if the amended complaint could be read to plausibly allege facts that would support
 15 Boeing’s knowledge of O’Connor’s alleged unfitness, the negligent retention claim nonetheless
 16 fails for want of causation. The amended complaint alleges that “Boeing’s continued retention of
 17 O’Connor was the direct and proximate cause of Mr. Washington’s injury, specifically,
 18 O’Connor’s continued employment at Boeing provided [him] with the knowledge necessary to
 19 [kill] Washington[,”] because O’Connor knew Washington’s commuting route to the Boeing
 20 facility. Dkt. No. 28 ¶ 4.3. This allegation overlooks that the amended complaint alleges that
 21 O’Connor killed Washington in a public, non-work location while neither man was working, and
 22 this allegation indicates that O’Connor was not acting as a Boeing employee at the time of
 23 Washington’s murder. *See id.* ¶ 3.27. These allegations therefore suggest that Boeing’s retention
 24 of O’Connor was *not* the proximate cause of Washington’s murder, if O’Connor was not acting as

1 Boeing employee nor enjoying any of the benefits of his employment at the time of the murder.
 2 Because the murder was not committed by O'Connor *qua* employee, the amended complaint fails
 3 to allege facts linking Boeing's retention of O'Connor to O'Connor's murder of Washington.

4 That Washington's murder did not occur while O'Connor was acting as an employee
 5 distinguishes this case from other factual scenarios where plaintiffs and/or courts have
 6 contemplated negligent retention claims. *See, e.g., Dold v. Snohomish Cnty.*, 649 F. Supp. 3d 1084
 7 (W.D. Wash. 2022) (police officers killed plaintiff during mental health intervention and plaintiff's
 8 estate sued officers' employer); *Hicks v. Klickitat Cnty. Sheriff's Off.*, 515 P.3d 556 (Wash. Ct.
 9 App. 2022) (father alleged that a state social worker negligently investigated a claim of abuse of
 10 his child, and sued the state for negligent retention); *Preston v. Boyer*, No. C16-1106-JCC-MAT,
 11 2019 WL 8060201 (W.D. Wash. Nov. 27, 2019) (plaintiff alleged a police officer used excessive
 12 force causing injuries during an arrest and sued officer's employer for negligent retention);
 13 *LaPlant v. Snohomish Cnty.*, 271 P.3d 254, 256 (Wash. Ct. App. 2011) (discussing whether a claim
 14 for negligent hiring, training, or supervision arises where an employee acts within the scope of
 15 employment, in a case where plaintiff was injured during a police pursuit); *Carlsen v. Wackenhut
 16 Corp.*, 868 P.2d 882 (Wash. Ct. App. 1994) (concert attendee was sexually assaulted after asking
 17 security guard for help finding seat, and attendee sued guard's employer for negligent retention).
 18 Plaintiff cites no authority indicating that the facts as alleged here could support a negligent
 19 retention claim, where O'Connor injured Washington while O'Connor was not working, was not
 20 on Boeing property, and was not utilizing any benefit of his Boeing employment.

21 Although Plaintiff cites a case (Dkt No. 39 at 20) explaining that for purposes of eligibility
 22 for workers' compensation in Washington, a worker's injury that occurs while traveling to or from
 23 work to a special assignment can be considered to have occurred in the scope of employment, this
 24 case does not pertain to a negligent retention claim and bears no similarity to the facts at issue

1 here, where Washington was not on a special errand of his employer at the time of his death. *See*
 2 *Cochran Elec. Co. v. Mahoney*, 121 P.3d 747 (Wash. Ct. App. 2005).

3 And although, as recently acknowledged by the Ninth Circuit, an employer generally has
 4 no duty to control the conduct of a third person to protect an employee, Washington law recognizes
 5 “a number of protective special relationships” as exceptions to that rule. *Drammeh v. Uber Techs.,*
 6 *Inc.*, No. 22-36038, 2024 WL 4003548, at *1 (9th Cir. Aug. 30, 2024). “[A] special relationship
 7 under Washington law requires the ‘traits of dependence and control.’” *Id.* at *2 (quoting *Barlow*
 8 *v. State*, 2 540 P.3d 783, 788 (Wash. 2024)). The *Drammeh* court noted that the relationship at
 9 issue in that case—rideshare companies and their drivers—was analogous to an
 10 employer/employee relationship and a contractor/subcontractor relationship, such that a special
 11 relationship existed that imposed a duty on rideshare companies “to use reasonable care in pairing
 12 their drivers with riders.” *Id.* (citing *Vargas v. Inland Wash., LLC*, 452 P.3d 1205, 1212 (Wash.
 13 2019) (explaining that “when a general contractor engages a subcontractor and retains control over
 14 some part of the work, the general contractor has a duty, within the scope of that control, to provide
 15 a safe place of work” (cleaned up))). Plaintiff has not argued that Boeing owed Washington a duty
 16 of care similar to that found in *Drammeh*, but even if Boeing did owe such a duty, the duty would
 17 extend to protecting Washington from foreseeable workplace dangers, not dangers faced in public.
 18 *See, e.g., Bartlett v. Hantover*, 513 P.2d 844, 849 (Wash. Ct. App. 1973) (“The employer has a
 19 duty to make reasonable provision against foreseeable dangers of criminal misconduct to which
 20 the employment exposes the employee[,] [i]f the nature of the work is such that it exposes the
 21 employee to the risk of injury from the criminal acts of third persons[.]”), *rev’d on other grounds*,
 22 526 P.2d 1217 (Wash. 1974)).

23 While it is true that an employer may be held liable for its employees’ actions outside of
 24 work premises and during non-work hours where a special relationship obligates an employer to

1 protect the plaintiff from harms caused by its employees (e.g., in a school or church setting),
2 Plaintiff has cited no case suggesting that Boeing’s relationship with Washington obligated it to
3 provide such protection. *See, e.g., C.J.C. v. Corp. of Cath. Bishop of Yakima*, 985 P.2d 262, 275
4 (Wash. 1999) (“Where a protective special relationship exists, a principal is not free to ignore the
5 risk posed by its agents, place such agents into association with vulnerable persons it would
6 otherwise be required to protect, and then escape liability simply because the harm was
7 accomplished off premises or after-hours.”). Rather, Plaintiff has cited no case with an
8 employment relationship similar to the relationship here where a court has imposed a duty on an
9 employer to control an employee *outside* the course of the employee’s employment in the context
10 of a negligent retention claim, and the Court is not aware of any.

11 Because the amended complaint not only fails to allege facts indicating that Boeing’s
12 continued retention of O’Connor was the proximate cause of Washington’s death, but instead
13 alleges facts suggesting that Boeing’s retention of O’Connor was *not* the proximate cause of
14 Washington’s death, the amended complaint fails to state a plausible claim for negligent retention
15 and amendment could not cure the deficiency in this claim.

16 **C. The Amended Complaint Does Not State a Claim for Discrimination.**

17 The Washington Law Against Discrimination (“WLAD”) prohibits discrimination in the
18 terms or conditions of employment on account of race, among other characteristics. WASH. REV.
19 CODE § 49.60.180. Under the burden-shifting analysis applicable to WLAD claims, the plaintiff
20 bears the initial burden to show that (1) the plaintiff is a member of a protected group, (2) the
21 plaintiff was qualified for the plaintiff’s position (satisfactorily performing the job), (3) suffered
22 an adverse employment action, and (4) similarly situated employees outside the protected class
23 were treated more favorably or other circumstances surrounding the adverse action give rise to an
24 inference of discrimination. *Gamble v. Pac. Nw. Reg’l Council of Carpenters*, No. 2:14-cv-

1 00455RSM, 2015 WL 402782, at *3 (W.D. Wash. Jan. 29, 2015). As an alternative to this burden-
 2 shifting analysis, the plaintiff may demonstrate the employer’s discriminatory intent by producing
 3 “direct or circumstantial evidence” of discrimination. *Id.*

4 Boeing argues that Plaintiff’s discrimination claim must be dismissed because the amended
 5 complaint fails to identify an adverse employment action that could support the claim. Dkt. No.
 6 33 at 21–23. The amended complaint alleges that Washington suffered an adverse employment
 7 action because he was unable “to work without fear of harm from another employee.” Dkt. No.
 8 28 ¶ 4.8. Plaintiff contends that requiring an employee to work while fearing harm from a co-
 9 worker can be an adverse employment action, but the authority cited for that proposition is
 10 inapplicable here. Dkt. No. 39 at 23 (citing *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013)).
 11 In *Dahlia*, an employee claimed that a supervisor’s threats chilled her constitutionally protected
 12 speech. 735 F.3d at 1065. The Ninth Circuit agreed that the employee’s allegations of retaliatory
 13 threats of harm from a co-worker were sufficient to deter a reasonable employee from engaging in
 14 protected speech, such that the employee had suffered an adverse employment action. *Id.* at 1079.
 15 In *Dahlia*, the plaintiff alleged threats of harm in retaliation for whistleblowing (which the Ninth
 16 Circuit found to be constitutionally protected speech), and it was the First Amendment retaliation
 17 that the Ninth Circuit found to be the adverse employment action. *Id.* at 1078–79. *Dahlia* does
 18 not, therefore, stand for the proposition that whenever an employee has reason to fear another co-
 19 worker, the employer has taken an adverse employment action against the employee. The Court
 20 is not aware of any authority that would support such a proposition.

21 Plaintiff’s opposition brief also argues that two instances of inaction by Boeing materially
 22 disadvantaged Washington and therefore constitute an adverse employment action. Specifically,
 23 Plaintiff alleges that Boeing failed to offer Washington a schedule or location change to allow him
 24 to avoid O’Connor and that Boeing employees contacted Pettit during non-work hours to check on

1 her safety but did not check on Washington. Dkt. No. 39 at 23 (citing *Nahum v. Boeing Co.*, No.
 2 2:19-CV-1114-BJR, 2019 WL 6878242, at *3 (W.D. Wash. Dec. 17, 2019) (citing *Jinadasa v.*
 3 *Brigham Young Univ. Haw.*, No. 14-00441 SOM/BM, 2015 WL 3407832, at *4 (D. Haw. May 27,
 4 2015) (defining an adverse employment action as “a material employment disadvantage, such as
 5 a tangible change in duties, working conditions or pay”))). Neither *Nahum* nor *Jinadasa* support
 6 the proposition that an employer’s failure to offer a change to an employee’s working conditions
 7 or a co-worker’s failure to contact an employee during non-work hours could amount to an adverse
 8 employment action. Although Plaintiff emphasizes that an adverse employment action need not
 9 cause a “significant” employment disadvantage (Dkt. No. 39 at 23), the significance of the inaction
 10 alleged here is not the issue. Instead, the problem is that Plaintiff has failed to cite any authority
 11 to support the assertion that Boeing’s failure to offer a schedule change or failure to contact
 12 Washington during non-work hours could constitute an adverse employment action. While an
 13 employer’s denial of an employee’s request to change a work schedule can constitute an adverse
 14 employment action, the Court is not aware of any authority indicating that an employer’s failure
 15 to affirmatively offer an employee a schedule change can as well. *See, e.g., Kurdi v. Cal. Dep’t of*
 16 *Transp.*, No. 1:22-cv-00729 JLT EPG, 2023 WL 267538, at *9 (E.D. Cal. Jan. 18, 2023) (citing
 17 *Smith v. Cnty. of Santa Clara*, No. 5:11-cv-05643-EJD, 2016 WL 4076193, at *5 (N.D. Cal. Aug.
 18 1, 2016)).

19 Moreover, Boeing has cited authority indicating that an adverse employment action must
 20 result in “a discharge, demotion, or change [in the employee’s] benefits or responsibilities.” *Marin*
 21 *v. King Cnty.*, 378 P.3d 203, 212 (Wash. Ct. App. 2016). An employer’s inaction can constitute
 22 an adverse employment action, but the inaction must nonetheless adversely affect the employee’s
 23 conditions of employment. *See, e.g., Bleeker v. Vilsack*, 468 F. App’x 731, 732 (9th Cir. 2012)
 24 (“Even inaction—a failure to renew or extend an employment contract—can count as an adverse

1 employment action in some circumstances.”); *McEnroe v. Microsoft Corp.*, No. CV-09-5053-LRS,
 2 2010 WL 4806864, at *5 (E.D. Wash. Nov. 18, 2010) (“Even had [Defendant] actually ignored
 3 Plaintiff’s complaints, that mere failure to investigate itself did not adversely affect the terms or
 4 conditions of Plaintiff’s employment.”).

5 For these reasons, the amended complaint fails to identify a change in any condition or
 6 benefit of Washington’s employment that resulted from Boeing’s action or inaction, and thus fails
 7 to identify the adverse employment action needed to state a discrimination claim. The Court has
 8 no basis to find that granting leave to amend again would cure this deficiency. *See Chodos v. West*
 9 *Publ’g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002) (“[W]hen a district court has already granted a
 10 plaintiff leave to amend, its discretion in deciding subsequent motions to amend is particularly
 11 broad.” (cleaned up)).

12 **D. Plaintiff’s Claims Are Dismissed Without Leave to Amend.**

13 As explained herein, the amended complaint contains deficiencies as to both claims
 14 pleaded. Because the Court has already provided Plaintiff with one opportunity to cure these
 15 deficiencies, and these deficiencies cannot be cured via further amendment, the Court will now
 16 dismiss them with prejudice. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 701 (9th Cir.
 17 1988) (“Leave to amend should be granted if it appears at all possible that the plaintiff can correct
 18 the defect.” (cleaned up)).

19 **III. CONCLUSION**

20 For these reasons, the Court GRANTS Defendant’s motion to dismiss. Dkt. No. 33.

21 Dated this 18th day of September, 2024.

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24 Kymberly K. Evanson
 United States District Judge